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December 27, 2004

**DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS**

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: June 23, 2004

Case Number: TSO-0123

This Decision concerns the eligibility of XXXXXX (hereinafter referred to as "the individual") to hold an access authorization (also called a security clearance). The local DOE security office suspended the individual's clearance after determining that information in its possession created substantial doubt about the individual's continued eligibility for an access authorization under the Department of Energy (DOE) regulations set forth at 10 CFR Part 710, Subpart A, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As explained below, I have concluded that the individual's access authorization should not be restored at this time.

Background

The individual works at a DOE facility where some assignments require an access authorization. The local DOE security office issued a Notification Letter to the individual on May 24, 2004. The Notification Letter alleges that DOE has substantial doubt about the individual's continued eligibility for a clearance, based upon disqualifying criteria set forth in section 710.8(l).

The Notification Letter alleges that the individual has been involved in a total of four incidents of shoplifting during the three-year period January 2000 through December 2003. This charge is based on the individual's self-reported history of shoplifting, which includes an arrest for Theft, Third degree, for shoplifting some razor blades and cheese in December 2003; two additional undetected shoplifting incidents also involving items of nominal value, that occurred in the month before the December 2003 arrest; and a prior arrest for shoplifting a DVD player priced at \$179 in January 2000.

According to the Notification Letter, the local security office twice referred the individual to the same DOE consultant psychiatrist for evaluations "due to problems with shoplifting"—first in 2000, and again in 2004. In the most recent report, dated February

24, 2004, the DOE psychiatrist diagnosed the individual as having Impulse Control Disorder, not otherwise specified. The DOE psychiatrist opined that the individual “had not demonstrated sufficient participation in any treatment program to guarantee that [he] does not need further rehabilitation and reformation of his behaviors.” Notification Letter at Paragraph 6.

Because of these security concerns, the case was referred for administrative review. The individual filed a request for a hearing. The local DOE security office transmitted the hearing request to the Office of Hearings and Appeals (OHA), and the Director appointed me as Hearing Officer in this case. At the hearing I convened in November 2004, the DOE Counsel called two witnesses, the DOE psychiatrist, and a personnel security specialist. The individual, who was represented by counsel, testified on his own behalf, and called four other witnesses: his private therapist, a leader from his church, and two coworkers. The DOE submitted seven written exhibits. The individual submitted a written answer to the charges in the Notification Letter, and introduced five written exhibits including his therapist’s treatment notes, a letter from a second church official, and material related to his employment at the DOE facility.

Standard of Review

The applicable DOE regulations state that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 CFR § 710.7(a). In resolving questions about the individual’s eligibility for access authorization, I must consider the relevant factors and circumstances connected with the individual’s conduct. These factors are set out in section 710.7(c):

the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors.

A DOE administrative review proceeding under 10 CFR Part 710 is authorized when the existence of derogatory information leaves unresolved questions about an individual’s eligibility for access authorization. A hearing is “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization.” 10 CFR § 710.21(b)(6). Once DOE has presented derogatory information affecting an individual’s eligibility for access authorization, the individual must come forward with evidence to convince DOE that restoring his or her access authorization “would not endanger the common defense and security and would be clearly consistent with the national interest.” *See, e.g., Personnel Security Hearing, Case No. VSO-0013, 24 DOE*

¶ 82,752 at 85,511 (1995), and cases cited therein. The DOE regulations were amended in 2001 to state that any doubt regarding an individual's eligibility for access authorization shall be resolved in favor of the national security. 10 CFR § 710.7(a). For the reasons discussed below, it is my opinion that the individual has not resolved the concerns in the Notification Letter, and therefore his access authorization should not be restored at this time.

Findings of Fact

The individual did not dispute the factual allegations in the Notification Letter. Instead, he tried to show he is rehabilitated and reformed, and will not do any shoplifting in the future. The individual maintained that his life is "compartmentalized," and his impulse control disorder has never affected his workplace behavior, which has always been honest, reliable and trustworthy.

DOE held two personnel security interviews (PSIs) with the individual, one in January 2000 after his shoplifting arrest earlier that month, and the second in February 2004 after his December 2003 shoplifting arrest. In the first PSI, the individual revealed historical information about shoplifting in his youth, but characterized the January 2000 arrest as a one-time event, and assured DOE it would not happen again. See Transcript of January 24, 2000 PSI. In the second PSI, the individual also disclosed information about the additional undetected acts of shoplifting committed during the month before his arrest in December 2003. See Transcript of February 4, 2004 PSI.

Testimony of the Witnesses at the Hearing

The DOE Psychiatrist's First Appearance

The DOE psychiatrist testified twice at the hearing. In his first appearance, the psychiatrist noted that he had evaluated the individual once before in 2000, at which time the individual treated his January 2000 shoplifting arrest as a single episode and promised it would not happen again. The psychiatrist accepted the individual's assurances in 2000. He did not make a diagnosis at that time, nor did he recommend any treatment for the individual. Psychiatrist's May 2000 Report at 4-5; Transcript of November 2004 Hearing (hereinafter cited as "Tr.") at 20-22.

The psychiatrist next referred to his most recent evaluation, and explained the bases for his finding in February 2004 that the individual was suffering from Impulse Control Disorder. The psychiatrist found that he could not make a definitive diagnosis on the individual, noting that

He does not meet all of the criteria for kleptomania, but can certainly be considered to have some impulse control problems, which have resulted in his experiences at stealing items of minor value from various establishments. I certainly do not suspect him of having any kind of antisocial characteristics, and there is certainly no evidence of a major thought disorder causing his behaviors.

Psychiatrist's February 2004 Report at 4; Tr. at 26-27. The psychiatrist concluded that at the time of his February 2004 evaluation, the individual had not shown adequate evidence of rehabilitation or reformation. He recommended the individual continue to see his private therapist, and that the individual's situation be reviewed after a period of 90 days. Psychiatrist's February 2004 Report at 5.

The psychiatrist testified that the individual's impulse control disorder is not something he has only in a particular environment, but that "like most mental disorders, it may be there in many, many forms for a long period of time, but with stress, then you see the disorder arise." Tr. at 28. In response to a specific question from the individual's attorney about whether a problem with the individual's impulse control disorder could ever arise at work, the psychiatrist answered "I would say I couldn't guarantee" that it would not. *Id.* at 40. He believes the individual's disorder is treatable, and he felt the individual has made some progress with his private therapist during the nine months since the February 2004 evaluation. However, the psychiatrist explained that he thought this individual would need about two years of therapy to show adequate evidence of rehabilitation or reformation. *Id.* at 29-33.

The Individual's Therapist

At the hearing, the individual's private therapist testified that he has seen the individual 13 times since their counseling relationship began nine months earlier. Like the DOE psychiatrist, the therapist diagnosed the individual with Impulse Control Disorder. *Id.* at 55. When the therapist first saw the individual, "he came in and said, 'I'm cured, I'm not going to do this again, this is very troubling to me, I'm taking full responsibility,' and was convinced that this isn't going to happen again." *Id.* at 52. The therapist explained to the individual that the goal of the therapeutic process was to begin by understanding why it happened, and then learn how to manage his behavior so he could avoid shoplifting in the future. *Id.* at 56, 64, 83.

The therapist described how the individual's behavior in his work, family, and religious environments was consistent with his rigid value system. The therapist found the individual's shoplifting as "aberrant in terms of his perception of himself," stating that "It's almost as if he checks [his values] at the door when that impulse takes over." *Id.* He agreed with the DOE psychiatrist that "there isn't a magic pill," and managing this behavior would be a lifelong task for the individual. *Id.* at 58.

According to the therapist, the individual has made progress in understanding his behavior:

I think his insight, particularly over the last couple of months, as we've addressed the specifics and as we've gotten into learning why this happened, and that there is a process, and that [the individual] needs to understand that and learn to manage it and to deal with, to learn to reduce the stresses in his life and that he

needs to break down the barriers, the compartment if you will, and make that value across the board work for him.

Id. at 58-59. The therapist noted that the individual was required by his deferred prosecution agreement to complete two years of therapy. The therapist conceded that despite the individual's good intentions and progress to date, he was in the beginning stages of the process and the insight required of him to manage his problem is just beginning to develop. *Id.* at 66.

The Individual

The individual described his religious conversion as a young man, his marriage and family life, his service as a Boy Scout leader, and the remorse he felt for shoplifting. *Id.* at 90-93. Commenting on his therapist's statements about "compartmentalizing," the individual explained:

...not thinking about your values at a particular moment in time, I think that's what he's talking about compartmentalizing.

Because in these situations, I wasn't thinking about my values and I wasn't thinking about the consequences. For some reason I put my brain on the shelf. It wasn't like I ever had any uncontrollable urge to do something or to steal. It was just that I wasn't thinking about the consequences.

And I had some history in the past that allowed me to rationalize, to have some distorted thoughts towards the situation and what I was actually doing. And I wasn't thinking about how that would affect either my family life, my family values, my church life or my church values, or my work life and values, or my security clearance.

Id. at 94. The individual went on to explain that unlike his situation in 2000, when he dismissed the possibility he would ever steal again, he has now sought counseling. As an adjunct to his counseling, the individual is also participating in a 12-step program. According to the individual, he understands that he lacks "sufficient power in and of myself to guarantee that I will not commit these acts that are contrary to my values without having instilled some safeguards or put up some barriers to prevent that from happening." *Id.* at 95. The individual maintains that he can control his behavior, pointing out that he controlled it over a 25-year period after his conversion and marriage and raising his children. He plans to continue working with his therapist for two years, to make his behavior consistent with his values in all aspects of his life. *Id.* at 100-102.

Finally, the individual emphasized his patriotism and many years of outstanding service to the DOE, noting that he has never done anything dishonest at work. He maintains that he is trustworthy enough to have a security clearance, and since the information about his shoplifting is "out on the table," he would not be vulnerable to coercion. According to

the individual, he would immediately report any blackmail attempt to the local DOE security office. *Id.* at 110, 124.

The Individual's Church Leader and Coworkers

A leader from the individual's church, and two coworkers at the DOE facility, testified as character witnesses for the individual. The church leader described the religious sanctions imposed against the individual to punish him for shoplifting. He indicated that the individual agreed with his clergyman to seek counseling and assistance to overcome the problem. While that process goes on, the ecclesiastical sanctions are still in effect. The official added that he has seen nothing in the individual's action in his church callings that would give him any reason to think that the individual was anything but an upstanding citizen. *Id.* 1t 89.

The two coworkers praised the individual's performance and conduct on the job, and generally echoed the testimony of the church leader about his character and personal values. Both stated that they have never seen any behavior that would lead them to question the individual's fitness to hold a DOE security clearance. One of the coworkers also praised the individual for getting counseling to address his shoplifting problem. *Id.* at 48, 135.

The DOE Psychiatrist's Second Appearance

The DOE psychiatrist testified again, after listening to the individual and his private therapist. He stated that nothing he heard would lead him to change his mind about the individual. He believes that the therapeutic process the individual began nine months before the hearing will take at least two years. Based on his opinion that further treatment is required, the psychiatrist believes the individual has not shown adequate evidence of rehabilitation or reformation. *Id.* at 113-122.

The DOE Security Specialist

The DOE security specialist explained why DOE was concerned about the individual's honesty and trustworthiness. First, the individual had promised not to shoplift again after the 2000 arrest, and DOE relied on that promise in deciding not to suspend his clearance. The individual failed to keep that commitment. Second, he explained, DOE was concerned about having an individual who could not obey the law, and who had engaged in repeated criminal conduct, working in a sensitive nuclear facility. The security specialist relied on the DOE psychiatrist's opinion that the individual had to complete the full two-year rehabilitation process before it would be appropriate to reconsider his eligibility to hold a clearance. *Id.* at 137-145.

Analysis

Shoplifting is a crime, and a history or pattern of criminal activity creates a doubt about a person's judgment, reliability and trustworthiness. In 2000, DOE relied on the

individual's characterization of his first arrest as a one-time event, and decided not to suspend his clearance after that incident, based on his commitment not to shoplift again. The individual's inability to keep his promise not to shoplift again, his second arrest in December 2003, and his admission in the February 2004 PSI that he stole on two other occasions show a pattern of criminal behavior. Thus, I find DOE had a substantial basis in the record for raising these concerns under Criterion L.

Applying the criteria set forth in 10 CFR § 710.7(c), I find that the individual's criminal conduct was serious, it was repeated rather than isolated, his participation was knowing and voluntary, it was recent, and he was a mature adult at the time. To mitigate DOE's concerns the individual would have to show that he is unlikely to repeat the conduct in the future. The critical issue in this case is whether the individual is rehabilitated from the shoplifting behavior diagnosed as Impulse Control Disorder by the DOE psychiatrist and his own private therapist. The individual has failed to make that showing. Both mental health professionals consider the individual's condition to be treatable, and think he has made some progress since he began counseling nine months before the hearing. However, the two experts also agree that the individual needs at least another year of therapy before they could consider him rehabilitated or reformed.

Finally, I reject the "compartmentalization" defense advanced by the individual. Personnel security is a 24 hour a day job, and the DOE cannot ignore off-duty criminal conduct that raises concerns about a clearance holder's judgment, reliability and trustworthiness.

Conclusion

Based on the record in this proceeding, I find that the individual has failed to resolve the security concerns under 10 CFR § 710.8(l) that were specified in the Notification Letter. For the reasons explained in this Decision, I find the individual failed to show that restoring his access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, it is my decision that the individual's access authorization should not be restored at this time.

Thomas O. Mann
Hearing Officer
Office of Hearings and Appeals

Date: December 27, 2004